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IN THE

Supreme Court of the United States

October Term, 1966

No. ~~1-375~~ 1147

K-91, INC.,
Petitioner,

v.

GERSHWIN PUBLISHING CORPORATION;
REMICK MUSIC CORPORATION,
BROADWAY MUSIC CORPORATION,
and BUXTON HILL MUSIC CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

K-91, INC., *Petitioner,*

v.

GERSHWIN PUBLISHING CORPORATION, REMICK MUSIC CORPORATION, BROADWAY MUSIC CORPORATION, and BUXTON HILL MUSIC CORPORATION, *Respondents.*

No.....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on January 13, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R.35[1]), is printed in Appendix "B" hereto, *infra*, p. A-4. The opinion of the Court of Appeals, printed in Appendix "C" hereto, *infra*, p. A-13, is reported in..... F.2d .....

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1967 (R. p. 303). A petition for rehearing was

1. "R." refers to documents in the record as listed in petitioner's designation of the record to the district court and respondents' counter designation. "Tr." refers to pages in the trial transcript. "P.Ex." refers to plaintiff's (respondents') exhibits. "D.Ex." refers to defendant's (petitioner's) exhibits. "App." refers to the appendix to this petition.

filed on February 8, 1967 and denied on February 16, 1967 (R. p. 304). The jurisdiction of the court is invoked under 28 U.S.C., Sec. ~~1945~~ 1254(1).

QUESTIONS PRESENTED

1. Is a combination of over 8000 music copyright owners who have pooled over one million copyrights and who offer to license only their entire package and only at a fee based upon a percentage of the licensee's gross income, automatically immunized from illegal block booking and price fixing merely because the individual copyright owners retain the right to license individual copyrights and because a federal court may determine if the license fee demanded is reasonable. Further, is the collective licensing immunized where negotiations by prospective licensees with individual copyright owners for separate copyrights is impossible and the only federal court which will determine the reasonableness of a quoted fee is located in New York out of reach of most prospective licensees.

2. Do the antitrust laws authorize the federal courts to fix the prices at which combinations of competing copyright owners can charge the public for their copyrights.

3. When a combination of copyright owners, acting to protect and further maintain its monopoly, presses upon users of its collective copyrights legal actions charging infringement of the copyrights accumulated to establish and further the monopoly, accompanied by a campaign of threats to intimidate and coerce the users into accepting its collective licenses, does the privilege of copyright absolve the combination from the consequences of damages under the Clayton Act?

4. Is a combination of owners who have combined their copyrights and are licensing them collectively in an entire package under one price arrangement given immunity from violation of the antitrust laws by the fact that prospective licensees can refuse to deal with them.

5. Does misuse of the copyright privilege bar a copyright owner from obtaining relief for copyright infringement.

6. Whether a consent decree by its terms can immunize against further violations of the antitrust laws.

STATUTES INVOLVED

The statutory provisions involved are Sections 1, 101, 116 of the Copyright Law, 17 U.S.C. Sec. 1, 101, 116; Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sec. 1-2; and Sections 4 and 16 of the Clayton Act, 15 U.S.C. Sec. 15, 26. The full text of the statutes will be found in Appendix "A."

STATEMENT

Introduction

The subject of this controversy is the method of marketing copyrighted music for performance on radio stations throughout the country. The case arose when scores of music copyright owners filed suit for infringement of their copyrights under 17 U.S.C. Secs. 1, 101, against eleven radio stations and a stockholder of one (R. 30, Fact 40). The copyright owners prayed for injunctions against further infringements, statutory damages, attorneys' fees and costs. Several of the suits were settled before trial. Three of the eleven stations sued elected to go to trial as "test

cases." The copyright owners prevailed and the district court entered judgment awarding damages and enjoining further infringement (App. "B"). Consequently, two stations and the stockholder settled (R. 49, Settlement Agreement). The petitioner, K-91, Inc., elected to appeal. The trial court had jurisdiction pursuant to 28 U.S.C. Sec. 1337 and 1338. The Court of Appeals had jurisdiction by virtue of U.S.C. 28, Sec. 1291.

In order to clearly present the issues, the stations admitted the infringements, but contended the copyright owners were misusing their copyrights in violation of public policy generally, and particularly in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sec. 1, 2. They contended no relief should be granted because the copyright owners had come into court with unclean hands. Specifically, the stations charged that the copyright owners had, between themselves and in conjunction with the American Society of Composers, Authors and Publishers (hereinafter "ASCAP"), fixed prices, engaged in block booking of copyrights and other unlawful practices in violation of the Sherman and Clayton Acts and the laws of the State of Washington, particularly R.C.W. 19.24. The stations also counterclaimed seeking treble damages and an injunction against further misuse of the copyrights. Fed. R. Civ. P. 13(a), 15 U.S.C. Secs. 15, 26.

Facts Establishing Combination, Monopoly and Discrimination

ASCAP is an unincorporated association located in New York acting as a licensing agency for its several thousand music copyright members (R. 30, Facts 10, 11). Besides its licensing functions, ASCAP polices for infringements.

(For background, see *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (1948) at 891). Each member assigns all its copyrighted musical compositions to ASCAP (R. 37, Fact 21, Def. Ex. A-4). The license fees collected are pooled and the proceeds divided (R. 37, Fact. 20, D. Ex. A-4). All performance rights owned by the members must be assigned to ASCAP for mutual licensing (R. 30, Fact 18, R. 37, Fact 21, D. Ex. A-4). Therefore, all the music copyrights sued for below are in the ASCAP license pool.

ASCAP is one of three music licensing organizations which together license substantially all of the copyrighted music works in the United States (R. 37, Fact 18). Today its membership is over 8,800 composers, authors and publishers (R. 37, Fact 16; R. 30, Fact 11). It controls more than a million music copyrights (R. 30, Fact 12, 13), and more than 50% of all copyrighted music broadcast is licensed by ASCAP (R. 37, Fact 18).[2]

In the 1940's, the Justice Department became concerned over ASCAP's activities and its overwhelming control of music licensing. The government sued, charging numerous infractions of the antitrust laws, including block booking and price fixing. This resulted in the 1941 consent decree. (The Amended Final Judgment of March 4, 1941, in the United States District Court for the South-

2. In 1962 (time of establishing stipulated facts), ASCAP collected almost 35 million dollars from license fees, over 30 million coming from 5,000 broadcasters (R. 30, Fact 49). More than 87% of ASCAP's total revenue is derived from the broadcasting industry and less than 13% from all other users combined (R. 30, Fact 48). In the State of Washington, the discrimination is worse. All collections are from broadcasters and ASCAP collects nothing from other music users (R. 30, Fact 21).

ern District of New York in Civil Case No. 13-95 (Def. Ex. A-1)). In 1948, two federal district courts held that notwithstanding the 1941 decree, ASCAP and its members were still violating the antitrust laws. *Alden-Rochelle v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948); *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948). As a consequence the 1941 decree was amended in 1950.

Significant to this petition, the 1950 consent decree provided the following:

1. The licensing rights acquired by ASCAP must be non-exclusive (D. Ex. A-2, §IV(B)).

2. ASCAP is required to issue to motion picture producers a single license covering copyrighted music on films without requiring further licenses by theaters showing the films (D. Ex. A-2, § V(C)).[3]

3. ASCAP is permitted to fix the license fees it will charge and the method of assessing the fees, but the United States District Court for the Southern District of New York is empowered to review the reasonableness of the proposed fee and set a different fee (D. Ex. A-2, § IX). Significantly however, the court has no power to determine the formula for assessment. (See, *In re Matter of the Application of Shenandoah Valley Broadcasting, Inc., et al.*, U.S. Dist. Ct. So. Dist. N.Y. Civil 13-95).

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3. Significantly, the decree does not require ASCAP to give the same kind of protection to television stations which show the same films. Also the decree does not require ASCAP to issue such single licenses to record producers without requiring further licenses by radio stations performing the music on the records (D.Ex. A-2, R. 37, Fact 73). Therefore, although radio and television stations compete with moving picture theatres in the entertainment industry, they are not freed by the decree or by ASCAP voluntarily from paying fees to ASCAP, but their competitors in the motion picture industry are.

Facts Establishing Block Booking

ASCAP insists that prospective licensees accept its entire package of over 1 million music copyrights and refuses to offer licenses of parts of its pool (R. 30, Facts 22, 23, 25, 82). High quality music, greatly desired, is licensed by ASCAP only on the condition that inferior and no longer popular music which comprises the vast bulk of its pool is also taken (R. 30, Facts, 81-84). Thus, broadcasters are forced to pay for music they do not want or need (R. 36, Tr. 171-73, 210-11). The 1950 consent decree does not prohibit this, but instead the decree requires that ASCAP's right to license be non-exclusive. Therefore, the individual members of ASCAP are free to make their own arrangements with prospective licensees. Unfortunately, this is an impossible alternative and worthless to prospective licensees and copyright owners alike because stations cannot contact over 8,800 copyright owners and negotiate thousands of individual licenses (R. 30, Fact 56, R. 37, Fact 25).

At the present time, broadcasters do not need nor can they possibly use all of ASCAP's one million musical selections (R. 36, Tr. 8, 9, 16-18, 81-83, R. 36, Tr. 173, 200, 201). Some stations only need western music, others religious, some rock and roll, and others classical (R. 30, Fact 81). In fact, most modern day radio stations specialize, and although they make many plays each year most are repeats. The petitioner also specializes and needs very little of ASCAP's repertory. More significantly, radio stations, including the petitioner, cannot survive without using some ASCAP music (R. 30, Facts 45, 48, R. 36, Tr. 5).

Facts Establishing Price Fixing

ASCAP offers broadcasters only two kinds of licenses called "Blanket" and "Per Program," but both require the licensee to take the entire ASCAP package and both require that fees be paid upon a flat percentage of gross revenues after certain deductions (R. 30, Fact 22, D.Ex. A-9). The blanket license fee is 2.125% of all gross revenues of the station. The per program license fee is 8% of the gross revenues derived from programs on which ASCAP music is played (R. 30, Fact 23, R. 37, Fact 45). Even though much station revenue is derived from programs such as news, sports and discussion containing no music at all, most stations cannot afford to take a per program license (Tr. 17, 140, 171-2, 211, 226-227, 305). Thus, there is no genuine economic choice between the two forms of licenses.[4]

The decision to charge the same price for all music, to calculate fees on gross revenue rather than per piece or by weighted charges such as by popularity ratings or record sales, the deductions that may or may not be taken, the terms for collection of payments, the terms for cancellation, and all details are determinable by ASCAP without court review (R. 30, Fact 24, D.Ex. A-9). The only matter subject to court review is whether or

4. The per program license is so impractical and onerous as to be no alternative at all. Of the over 5,000 stations licensed by ASCAP and broadcasting in the United States, fewer than 100 have elected to use the per program license and none are using it in Washington (R. 30, Facts 57, 62).

not the rate charged on grosses as selected by ASCAP—that is the 2.125 per cent or the 8 per cent—is reasonable or not.[5]

Facts Establishing Coercion and Other Abuses

The continued acquisition of a huge number of copyrights into a central licensing agency is perpetuated by the bringing of numerous infringement suits (R. 30, Fact 12; R. 37, Facts 18, 20, 21). In the past year and one-half, ASCAP's members brought 15 suits against eleven radio stations in Washington alleging 272 infringements (R. 37, Fact 63). ASCAP makes all decisions to sue and has complete control of all litigation pursuant to its plan to foster and exploit the advantage of its copyright acquisitions (R. 37, Facts 55-62). The potential liability to the 11 stations selected amounted to a staggering $1,360,000.

Most significant is the fact that all radio station licenses expired on the same date and just as they all expired "ASCAP *refused* to offer licenses to any broadcasters located in the State of Washington." (R. 30, Fact 73.) (Emphasis added.) Not only was petitioner refused a license, but even all those stations licensed and paying fees were refused renewals. (This refusal was also found by Judge Ryan in the New York district court (P. Ex. 12).) This meant that no radio or television station in Washington

5. Also significant is the uselessness of the very limited court review. Under the 1950 consent decree, a prospective licensee who is dissatisfied with the percentage rate charged is given the "opportunity" of petitioning a court located in New York City for a determination (D. Ex. A-2, § IX). Because of petitioner's location on the opposite coast, this "opportunity" is not realistic but an illusion. And because the consent decree requires all licensees to be charged the same rate, individual rate determinations are illusory. (D. Ex. A-2, § IV(C).)

could obtain a license from ASCAP for music in order to stay in business. ASCAP refused to issue any licenses and it was impossible for them to obtain licenses from ASCAP's members (R. 30, Fact 56, R. 37, Fact 25).

REASONS FOR GRANTING THE WRIT

The Decision Below Raises the Substantial and Novel Question of Whether the Antitrust Laws Authorize the Federal Courts To Fix Prices Among Competitors

The court below holds that over 8,800 music copyright holders may legally combine and pool over one million copyrights and license only their entire package. Further, that a federal court may fix the prices at which the combination charges for its copyrights (App. "C"). This means that for the first time, federal courts have the authority under the antitrust laws to fix prices among competitors and further, for the first time they may act as quasi-administrative agencies with power to inquire into the reasonableness of the activities of price fixing combinations and into the reasonableness of the rates charged. The antitrust laws contain no provisions which authorize rate making by federal courts. To the contrary, all decisions heretofore have been that price fixing is per se unlawful. (See citations *infra.*)

Through the device of a consent decree the Justice Department and ASCAP have thrust upon a federal court rate making powers and administrative responsibilities heretofore only possessed by administrative agencies. Without congressional authority the decree transforms a federal court into the role of a regulatory commission with the power to make rate determinations affecting nationwide industries. The decree makes a federal judge

the national czar of the music licensing industry. His functions are more executive and administrative than judicial and his judgment is supreme. In reality a Federal Music Licensing Commission has been created for broadcasters whether they like it or not and competition among copyright owners has been eliminated. (See, *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961), *United States v. ASCAP*, 341 F.2d 1003 (2d Cir. 1965); *United States v. ASCAP*, 331 F.2d 117 (2d Cir. 1964); *In the matter of the Shenandoah Valley Broadcasting, Inc., et al., United States v. ASCAP*, Civil Action No. 13095 (S.D.N.Y.).

The Decision Below Is in Direct Conflict with the Decisions of the Supreme Court That Price Fixing Is a Per Se Violation of the Antitrust Laws

1. Ever since *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), the Supreme Court has ruled that price fixing among competitors is illegal per se, and the "power to fix prices, whether reasonably exercised or not, involves power to control the market . . ." (*United States v. Trenton Potteries Co., supra*, 273 U.S. at 397). The fact that ASCAP's 1950 consent decree permits a federal court to review the reasonableness of the license fees charged and fix reasonable fees sets a precedent which is not authorized by Congress in the Sherman and Clayton Acts (15 U.S.C. Sections 1-7, 12-27). It also runs contrary to the Supreme Court doctrine that the "machinery employed by a combination for price fixing is immaterial." (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).) The concept that price fixing should be permitted by any device whether judicially

reviewable or not is contrary to the objectives Congress had in mind in enacting the antitrust laws. Price fixing arrangements, no matter how accomplished, are potential threats to free competition and necessarily involve power to control the market. Therefore, the courts have always held that arrangements which create such potential power are "themselves unreasonable and unlawful restraints without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions." (*United States v. Trenton Potteries Co., supra,* 273 U.S. at 398.) The lower court's decision is in theory and practical effect opposed to these long established principles.

Ever since the *Trenton Potteries* decision, the courts have been consistent that under the Sherman Act "a combination formed for the purpose and with the effect of raising, depressing, pegging or stabilizing the price of a commodity . . . is illegal per se." (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 223.) (See, Van Cise, Understanding the Antitrust Laws 24, 25 (1963) and cases cited therein.) The decision below means, however, that in matters involving music copyrights the rule that price fixing is per se illegal is no longer applicable and now in the future, courts will be permitted to inquire into the reasonableness of rates charged licensees. Stated otherwise, if this decision is allowed to stand, copyright owners will be excepted from the per se rule.

The court below rationalizes prices are not being fixed

because "ASCAP . . . is not the price fixing authority" and instead, the court fixes the prices (App. C). The substantive result that rates are fixed cannot be avoided merely by manipulation of words. The suppressing anti-competitive evil is still present whether a federal court is permitted to fix prices or otherwise competing copyright holders fix them. In either event, the end result is the same. Competition is removed and economic control fostered. In either event, the result is directly contrary to what Congress authorized in the Sherman Act. Moreover, the Supreme Court states that "in the absence of express legislation requiring it," and there is none, it would "hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable. . . ." (*United States v. Trenton Potteries Co., supra,* 273 U.S. at 398.) In spite of this, the court below adopts this uncertain test. It sanctions the right of the New York district court to determine reasonableness and thereby departs from the *Trenton Potteries* rule. It also disregards the holding in *United States v. Socony-Vacuum Oil Co.* that "the machinery employed by a combination for price fixing is immaterial." (*United States v. Socony-Vacuum Oil Co., supra,* 310 U.S. at 223.)

2. Assuming for argument that the New York district court should be permitted to determine the complex and uncertain question of reasonableness of the fee quoted, ASCAP still fixes price facets over which the district court has no control whatsoever. The point is that the lower court did not recognize at what point prices became fixed.

Under the consent decree, ASCAP has control of the licensing of all the copyrights of its members without the burden of court supervision of other pricing conditions except the final rate it elects to charge. The decree merely requires that ASCAP's licenses be "blanket" or "per program" and that they be non-discriminatory. This has already been determined by two federal courts. Judge Ryan, the very judge who administers the ASCAP consent degree, held that Section IX of the decree "deals with the procedure for determining reasonable license fees, not types of licenses" and the decree does not "compel ASCAP to give any type of license [an applicant] demands and have the court fix the fee." (*In the Matter of the Application of Shenandoah Valley Broadcasting, Inc., et al., United States v. ASCAP,* Civil Action No. 13095 (SDNY) *aff'd* 331 F.2d 117.) "On the contrary, the decree gives ASCAP the initiative in proposing the entire formula, contemplates further negotiations if this appears unreasonable, and directs an application to the court in case of a stalemate." (*United States v. ASCAP,* 341 F.2d 1003, 1009 (1965).) Consequently, the act of price fixing is accomplished before the court administering the decree ever sees an ASCAP license. ASCAP determines the formula for licensing and the decree does not compel ASCAP to provide any other formula (D. Ex. A-2, Sections VIII, IX). Thus, the prices are fixed within the meaning of *Trenton Potteries* and the other price fixing cases cited when ASCAP makes the initial determination that it will license only an entire package and no lesser part, that it will accept charges based only on a percentage of gross revenues and that it will price all its one million copyrights at the same rate (R. 30 Facts

24, 81, 82, 83, 85, D. Ex. A-9, being ASCAP's licenses). This alone is price fixing and the fact that a court is permitted to fix only whether the end percentage rate charged should be 1 per cent or 10 per cent is immaterial.

> "Hence prices are fixed within the meaning of the *Trenton Potteries Co.* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices, they are fixed because they are agreed upon. And the fact that, as here, they are fixed at the fair going market price is immaterial." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940).

3. The decision below also departs from another well established rule pertaining to illegal price fixing. Prices are fixed by the acts of purchasing "a part of a supply of a commodity for the purpose of keeping it from having a depressive effect on the market. . . ." (*United States v. Socony-Vacuum Oil Co., supra*, 310 U.S. at 224) The mere scheme of requiring all copyright owners to assign their supply of a million copyrights to it for mutual licensing is an act of price fixing regardless of the rate finally charged. *Northern Pacific R. Co. v. United States*, 356 U.S. 1 (1958); *International Salt Co. v. United States*, 332 U.S. 392 (1947); *Mercoid Corporation v. Mid-Continent Investment Co.*, 320 U.S. 661 (1944); *United States v. Masonite Corporation*, 316 U.S. 265 (1942).

If the lower court decision is allowed to stand, and courts are permitted to fix prices at which otherwise competing interests may charge the public, then competitors in other industries should also be able to combine and

have the benefit of a federal court fixing the prices at which they may charge their customers. Further, if the decision stands, henceforth questions of reasonableness are material to the issue of illegality. Further yet, if the decision stands, the per se rule is henceforth modified to the extent that music copyrights are excepted from its application, and that in the future the instance of illegal fixing takes place only at the point where charges are set. Acts which were formerly considered illegal price fixing such as pooling, joint licensing agreements, joint credit restrictions, etc. will be permissible so long as the end amount or rate charged is not fixed or if fixed, is subject to court review for reasonableness. These are the logical consequences of the decision if the lower court is correct in saying "ASCAP cannot be accused of fixing prices."

The Decision Below Is in Direct Conflict with the Decisions of the Supreme Court That Block Booking of Copyrights Is a Violation of the Antitrust Laws and Raises Substantial and Important Questions Concerning the Extent of the Antitrust Law's Prohibition Against "Tying" Agreements

1. This petition raises substantial and important questions concerning the extent of the antitrust law's prohibition against "tying" agreements and the relief necessary to eliminate such practices. The principle that block booking of copyrights is unlawful "grew out of a long line of patent cases which had eventuated in the doctrine that a patentee who utilized tying arrangements would be denied all relief against all infringements of his patent." (*United States v. Loew's, Inc.*, 371 U.S. 38, 45 and 46 (1962).) *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), condemned block booking of

copyrighted motion pictures into movie theatres. However, the court below held that pooling of over one million music copyrights and offering to license only the entire package is not unlawful block booking because "ASCAP's licensing authority is not exclusive," and the "right of the individual composer, author or publisher to make his own arrangements, are fully preserved." (App. "C"). The court plainly misapprehended the reach of *Paramount* because it ignored the trial court's finding and the stipulated fact that it is virtually impossible for prospective licensees to seek individual arrangements and virtually impossible for individual copyright owners to make their own arrangements with prospective licensees (R. 30, Fact 56, R. 37, Fact 25). The extent of the coercive power left in ASCAP's hands by this useless and illusory exception to *Paramount* is such that radio stations are still regularly required to deal with ASCAP and thereby are still induced and in fact required to take unneeded and unwanted music with needed and wanted music. Therefore "competition on the merits with respect to the tied product is inevitably curbed." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 6 (1958).

In the landmark case of *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156, this court defined "block booking" as "the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period." Condemning this practice as violative of the antitrust laws, the court stressed the anticompetitive effects of any form of block booking (*Id.* at 158):

> "Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other. The practice tends to equalize rather than differentiate the reward for the individual copyrights. Even where all the films included in the package are of equal quality, the requirement that all be taken if one is desired increases the market value for some. Each stands not on its own footing but in whole or in part on the appeal which another film may have * * * (T)he result is to add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses."[6]

The court concluded that copyrighted films may be sold "in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film," but that the Sherman Act forbade any "refusal to license one or more copyrights unless another copyright is accepted" (*Id.* at 159). See also *International Salt Co. v. United States*, 332 U.S. 392; *United States v. Griffith*, 334 U.S. 100; *Standard Oil Co. of California v. United States*, 337 U.S. 293; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594.

In *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, the court again explained why "tying agreements fare harshly under the laws forbidding restraints of trade." The opinion pointed out that such arrangements inevitably curb competition in the tied product on its merits by forcing buyers to forego their free choice between

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6. Compare: "The performance rights to some music in ASCAP's repertory is vastly more valuable than the performance rights to other music in ASCAP's repertory, and of all the millions of musical compositions copyrighted very few become hits or of any significant value. This is also true of the performance rights to music written by the plaintiffs." (R. 30, Fact 83.) (See R. 36, Tr. 170-2, 210-11, 269, 303-5.)

competing products and by "deny[ing] competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market" (356 U.S. at 6). (See R. 36, Tr. 170-2, 210-11, 269, 303-5; R. 30, Facts 81-83.) Accordingly, tying arrangements are unreasonable "in and of themselves," "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use" (356 U.S. at 5).

Applying these principles ASCAP's outright refusal to license one or more music copyrights unless other unwanted music is also taken is clearly unlawful. However, the court below approved the refusal to license other than in a block because ASCAP's licensing authority is not exclusive. It is the petitioner's contention that there are neither realistic factual differences nor relevant legal distinctions between (a) an outright refusal to license except in a block and (b) a refusal to license except in a block so long as an impossible method of licensing individual music is available. The effect of creating an unrealistic distinction between these categories is to invite wide-spread avoidance of the Sherman Act's prohibition against block booking agreements.

The anticompetitive impact of block booking is precisely the same whether or not the copyright holder reserves the right to license his music individually if realistically the right is virtually impossible to use. In both instances the same economic pressures are brought to bear on the prospective licensee by the copyright holder in order to induce a license of unwanted music along with

wanted music. A station which wants only part of the offered ASCAP repertory is induced to buy the entire package by its affirmative need to obtain the desirable portions of the package and by the futility of dealing with individual copyright owners. The broadcaster is still faced with the all-or-nothing proposal.

2. There is little legitimate business justification for an outright refusal to sell less than an entire package of copyrights. All of the copyright owner's legitimate business objectives can be accomplished without requiring licenses of the entire ASCAP repertory. These could easily be accomplished by requiring ASCAP members to handle licensing of music to the broadcasting industry as it is now required to license music to the motion picture industry.

Under the 1950 consent decree ASCAP and its individual members are prohibited from splitting performance rights and recording rights of music on motion picture films. Instead the decree requires them to offer to motion picture producers licenses of the right to record music on films and licenses to perform the music when the film is run. Therefore, when the producer distributes the film, it carries with it the right to perform the music on it. The theater exhibitor is therefore free to run the film in his theater without obtaining a license from ASCAP or its members. The theater exhibitor pays for the right to run the music on the film in the price of the film. To insure that this simple and fair method of licensing will be accomplished, the consent decree not only requires that a single performance license be offered to the producer, but it prohibits ASCAP and its members

from suing theater owners for infringement (D. Ex. A-2 Sections IV (E) (F), V (C)).

The consent decree does not provide the same simple and efficient relief to broadcasters. Petitioner submits it should. If ASCAP and its members were required to license performance rights to recording companies along with recording rights, stations would pay for the right to play a record in the purchase price of the record. Copyright owners would then be free to negotiate license fees with recording companies and could be paid on the basis of the number of records sold. Outdated music which is played infrequently would not then share in the revenues earned by popular music. Further, broadcasters would not be paying for undesired music as they now are.

Petitioner submits, however, that questions of business justification and precise effects upon competition are beside the point. Although the trial court in its opinion placed great reliance upon the business excuse for ASCAP's existence and methods (App. "B"), this court has ruled that tying arrangements, once found to exist, "are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." (*Northern Pac. Ry. v. United States, supra,* 356 at 5.)

The Decision Below Is so Inconsistent with Other Decisions Which Have Considered the Same Issues That the Application of the Antitrust Laws to Music Copyrights Is Now in a State of Confusion

1. Several other lower courts have considered the question of whether ASCAP and its members are violating

the antitrust laws and they have consistently found violations. The present case is the first one in which the decisions have been otherwise.[7]

Two lower cases were strikingly similar to the present case. In *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948), the issue was whether music copyright owners forfeited their rights to recover for infringement because of their membership in ASCAP. In *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948), over one hundred moving picture theater owners sued ASCAP for damages and injunctions under the Clayton Act. In both, the copyright owners and ASCAP lost and the theater owners prevailed.

The facts of each were identical to the facts of the present case, except that the 1941 consent decree then governing ASCAP's illegal activities did not permit the federal courts to fix the rates charged. Most significantly, the 1941 consent decree permitted the copyright owners to "deal individually with anyone seeking a license for performance of their compositions." (*M. Witmark & Sons v. Jensen, supra*, 80 F. Supp. at 845.) And again significantly, it was established that "the right of granting individual licenses by the individual copyright owner [was] 'illusory.'" (*Ibid.*) Nevertheless, and contrary to the decision of the court below, each court held that this "has all the evils of block booking which was analysed

7. *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948); *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948); *Buck v. Gallagher*, 36 F. Supp. 405 (W.D. Wash. 1940); *Buck v. Swanson*, 33 F. Supp. 377 (D. Neb. 1939). See also *Watson v. Buck*, 313 U.S. 387 (1941); *Marsh v. Buck*, 313 U.S. 406 (1941); *Buck v. Gallagher*, 307 U.S. 95 (1939); Justice Black dissent in *Gibbs v. Buck*, 307 U.S. 66, 81 (1939); *Affiliated Music Enterprises v. SESAC, Inc.*, 160 F. Supp. 865 (S.D.N.Y. 1958).

and condemned in *United States v. Paramount Pictures.*" (*Alden-Rochelle, Inc. v. ASCAP, supra,* 80 F. Supp. at 895.) Further, the *Witmark* court held that the copyright owners "acting in concert through ASCAP, fix prices and completely control competition and thereby restrained trade in violation of Section One of the Sherman Anti-Trust Act." (*M. Witmark & Sons v. Jensen, supra,* 80 F. Supp. at 850.) The members of ASCAP in transferring all their non-dramatic performing rights to ASCAP were held a "combination in restraint of interstate trade and commerce, which is prohibited by Sec. 1 of the anti-trust laws." (*Id.* at 844.)

Again contrary to the results in the present case, the *Alden-Rochelle* court stressed that a "combination of copyrights and a pooling of the proceeds derived from the licensing of the copyrights through the illegal combination, renders unenforceable the rights granted under the Copyright Act, at least while the illegal combination continues. See *Morton Salt Co. v. G. S. Suppiger Co.,* 314 U.S. 488, 62 S.Ct. 402, 86 L.Ed. 363; *B. B. Chemical Co. v. Ellis,* 314 U.S. 495, 62 S.Ct. 406, 86 L.Ed. 367, and *United States v. Line Material Co.,* 333 U.S. 287, at Page 310, 68 S.Ct. 550 . . ." (*Alden-Rochelle, Inc. v. ASCAP,* 80 F. Supp. at 904.) Further, the court below ignored the rule that in patent and copyright infringement suits it is unnecessary to decide whether the anti-trust laws were violated because the maintenance of the improper suits "is contrary to public policy generally." *Morton Salt Co. v. Suppiger,* 314 U.S. 488, 494 (1942). "It is sufficient to say that in whatever posture the issue may be tendered courts of equity will withhold relief where the patentee and those claiming under him are

using the patent privilege contrary to the public interest." (*Mercoid Corporation v. Mid Continent Investment Co.*, 320 U.S. 661, 660 (1944).)

The confusion is compounded by a decision of the very court which presides over the ASCAP consent decree. In *Affiliated Music Enterprises v. Sesac, Inc.*, 160 F. Supp. 865 (S.D.N.Y. 1958) involving pooling of musical copyrights Judge Ryan held "pooling agreements are per se violations of the antitrust laws." (*Affiliated Music Enterprises v. Sesac, Inc., supra*, 160 F. Supp. at 875.) More startling, the court below ignored Judge Ryan's statement that offering individual per piece licenses as an alternative to blanket licenses is merely the "lesser of two evils" with "no 'genuine economical choice' between the two types of licenses." (*Ibid.*)

The decision below also conflicts with a recent decision of a Washington State court, *Cascade Broadcasting Company v. ASCAP*, Superior Court of the State of Washington in and for Yakima County, No. 45877 (App. "D"). As recently as last year on the same facts as the present case, the Washington court relying upon *Loew's, Paramount Pictures* and patent infringement cases, ruled that ASCAP's system of blanket and per program licenses was an illegal "tying of one copyright to another for the purpose of a package or blanket sale" (*Id.*, Part I at 17), and that the consent decree's disinfection of violations by permitting individual licensing "is so impractical it is no alternative at all" (*Id.*, Part II at 4) (App. "D").

2. The court below plainly misapprehended the reach of the *Mercoid* and *Morton Salt* decisions when it failed to comprehend ASCAP's activities in their overall per-

spective. Infringement suits standing alone may not be sufficient to sustain a charge of abuse, but should be "considered with the entire monopolistic scheme which preceded them" (*Kobe, Inc. v. Dempsey Pump Co.*), 198 F.2d 416, 425 (10th Cir. 1952) *cert. denied* 334 U.S. 837. ASCAP's activities should be considered as an entire picture. Not as isolated incidents but as facets of an overall scheme. In taking its narrow perspective, the decision below "would permit a monopolizer to smother every potential competitor with litigation" (*Ibid.*) and permit "the courts to be a vehicle for maintaining and carrying out an unlawful monopoly which has for its purpose the elimination and prevention of competition" (*Id.* at 424).

3. Finally, the lower court's decision is in direct conflict with this court's rule that having the option to refuse to deal gives no defense. The decision below erroneously stresses that petitioner "could have refrained from giving public performances for profit of music in ASCAP's repertory."[8] This gives respondents no excuse. The fact that one "can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws." *Simpson v. Union Oil Co.*, 377 U.S. 13, 16 (1964). The lower court failed to recognize that the abuse is "occasioned by the necessity that defendant make a choice among alternatives each of which had an adverse economic effect on its business." (*Hazeltine Research, Inc. v. Zenith Radio Corporation*, 239 F. Supp. 51, 72 (N.D. Ill. 1965).) Although it was petitioner's choice, "it was the necessity of having to choose

8. Compare the four exculpatory options stressed by the lower court: (1) blanket licenses, *i.e.*, tying agreements, (2) per program licenses, *i.e.*, tying agreements, (3) individual licenses, *i.e.*, impossibility, (4) refusal to deal, *i.e.*, coercion (App. "C," p. A-24).

that occasioned the injury." (*Ibid.*) In the present case the alternatives were coercive; therefore petitioner could properly refuse to take a license.

Petitioner submits that the decision below is inconsistent with all the cases considering the same issues involving pooling of copyrights. If it is allowed to stand the intent and meaning of the antitrust laws as applied to music licensing will be and remain in a state of confusion.

CONCLUSION

This petition raises substantial and important questions concerning the extent of the antitrust laws application to music licensing. The decision has far-reaching effects upon thousands of broadcasting stations and thousands of copyright owners and involves millions of dollars in fees paid annually. Because no authorities were cited and no decisions compared the lower courts failed in their duties to inform and guide and the state of the law is confused and uncertain. At this moment several similar cases are pending and will be tried unless this court grants this petition. Grave and sweeping precedents are implied, namely that music copyrights are to be given exceptional treatment, that prices among competitors can be fixed by courts, that courts may act as rate-making agencies, that block booking can be avoided by providing impossible alternatives, and infringement suits can be used as weapons to coerce. Finally, the "perplexing problem" of whether a consent decree immunizes against vio-

lations of the antitrust laws is left unanswered.

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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